No. 15-1095

In The Supreme Court of the United States

MARY NELL WYATT, individually and as executrix of THE ESTATE OF RONALD E. WYATT; DANIEL WYATT; AMANDA LIPPELT; MICHELLE BROWN; MARVIN T. WILSON; RENETTA WILSON; MARTY R. WILSON; GINA R. BROWN; BRADLEY G. KEY; KIMI L. JOHNS; & BARRY T. KEY,

Plaintiffs-Petitioners,

v.

SYRIAN ARAB REPUBLIC,

Defendant,

(caption continued on inside cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

ROBERT J. TOLCHIN
Counsel of Record
MEIR KATZ

The Berkman Law Office, LLC
111 Livingston Street
Suite 1928
Brooklyn, New York 11201
(718) 855-3627
rtolchin@berkmanlaw.com
mkatz@berkmanlaw.com

Counsel for Petitioners

(caption continued from cover)

V.

FRANCIS GATES, individually and as administrator of THE ESTATE OF OLIN EUGENE "JACK" ARMSTRONG, PATI HENSLEY, SARA HENSLEY, & JAN SMITH,

Third-Party Defendants-Respondents,

and

FRANCIS GATES, individually and as administrator of THE ESTATE OF OLIN EUGENE "JACK" ARMSTRONG, PATI HENSLEY, SARA HENSLEY, & JAN SMITH,

Plaintiffs-Respondents

V.

SYRIAN ARAB REPUBLIC,

Defendant,

V.

MARY NELL WYATT, individually and as executrix of THE ESTATE OF RONALD E. WYATT; DANIEL WYATT; AMANDA LIPPELT; MICHELLE BROWN; MARVIN T. WILSON; RENETTA WILSON; MARTY R. WILSON; GINA R. BROWN; BRADLEY G. KEY; KIMI L. JOHNS; & BARRY T. KEY,

Claimants-Petitioners.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statues, Regulations, and Rules

REPLY BRIEF FOR THE PETITIONERS

The Gates Plaintiffs oppose the petition with a smokescreen; they devote most of their space to irrelevant matters, not even addressing the Circuit conflict until page 22 of their submission.

They hope to avoid review by contriving vehicle problems, suggesting falsely that the petitioners had successfully intervened in the *Gates* litigation in D.C. (Br.Opp. 29), imagining away the problems with their case, declaring (again, falsely) that the Syrian assets being debated somehow belonged to them even before the first appeal to the Seventh Circuit (Br.Opp. 5), and gratuitously slinging mud at petitioners' counsel.

The Gates Plaintiffs focus on all the wrong issues. They never grapple with the fact that the Seventh Circuit narrowed the issues by declining to reach certain questions and assuming away others. The Seventh Circuit expressly assumed that the Gates Plaintiffs did not comply with 28 U.S.C. 1608(e). (Pet. App. 24a-25a) ("[W]e assume that…the Gates plaintiffs have not complied[.]"). Accordingly, their compliance, *vel non*, with §1608(e) is not before this Court. Rather, the question is whether the Gates Plaintiffs' presumptive noncompliance is fatal to their judgment enforcement efforts. Yet the Gates Plaintiffs devote much of their submission to defending their attempt at compliance with §1608(e). Similarly, the Gates Plaintiffs fixate on proving that their judgment is not void, though no one

has argued it to be void. Petitioners have argued simply that the Gates Plaintiffs' judgment, while valid, is not yet enforceable.

Remarkably, the Gates Plaintiffs present no substantial argument on the second question presented. Of the four pages they devote to that question, just one paragraph even arguably responds to the petition. The remainder of those four pages discusses a point that the petitioners expressly conceded.

Regarding the first question presented, the Gates Plaintiffs make no attempt to argue that the decision below is consistent with the articulated position of the United States, *see* (Pet. 27-28), offer no response to the argument that the question is exceptionally important in light of the broad non-compliance that the Seventh Circuit's decision may inspire, and offer no response to the petitioners' detailed demonstration of the errors of the Seventh Circuit below. *See* (Pet. 28-34). In fact, the Gates Plaintiffs make just a single passing *mention* of a central feature of that discussion, the "as provided" clause of 28 U.S.C. 1610(g). *See* (Pet. 29-32); (Br.Opp. 14).

The Gates Plaintiffs would eviscerate Syria's sovereign immunity because it is a state sponsor of terrorism. The petitioners, victims of Syrian-sponsored terrorism, painfully and empathetically understand the Gates Plaintiffs' anger. But Congress has mandated a different approach. Syria was entitled to written notice of the default judgment against it,

presented in accord with a specified procedure, to ensure that the proper people within the Syrian government timely learned of the default judgment. Indeed, given the explicit statutory requirement of service, it might even be understandable for the Syrian government to have ignored the judgment until it was served. The Gates Plaintiffs failed to provide that required notice and must now do so before they may attempt to enforce their judgment. The Seventh Circuit's decision to the contrary warrants review.

I. The Seventh Circuit refused to apply the FSIA as Congress wrote it

The Gates Plaintiffs make much ado over the petitioners' purported failure to quote in full 28 U.S.C. 1610(c).[1] They myopically focus on its first clause—"No attachment or execution referred to in subsections (a) and (b)"—suggesting that the statute's failure to mention §1610(g) ends the discussion. But they virtually ignore §1610(g) and pay little attention to §1608(e).

Section 1610(g), stating that judgment enforcement shall occur "as provided in this section," expressly incorporates other provisions of §1610. The

[1] In fact, §1610(c) was reproduced in full in the appendix (Pet. App. 95a), was prominently described in the petition (Pet. 3, 13-14, 28), and significantly informed the first of the questions presented. (Pet. i).

Gates Plaintiffs acknowledge as much. (Br.Opp. 14). One would expect, therefore, that the Gates Plaintiffs would explain why they believe "as provided" not to incorporate §1610(c). They do not even try. Relying on *Bennett v. Islamic Rep. of Iran*, 2016 WL 697604 (9th Cir. Feb. 22, 2016), they assert that the "as provided" clause incorporates only the "procedures contained in §1610(f)." (Br.Opp. 14). That portion of *Bennett* is unpersuasive, as petitioners explained without refutation from the Gates Plaintiffs. *See* (Pet. 29-30). Moreover, *Bennett* does *not* hold that the "as provided" clause does not incorporate §1610(c); the decision did not pertain to §1610(c).[2] In fact, §1610(g) incorporates §1610(c). *See* (Pet. 32).

Similarly, the Gates Plaintiffs give short shrift to §1608(e). That provision demands: "A copy of a[FSIA] default judgment *shall* be sent to the foreign state or political subdivision in the manner prescribed for service in [§1608(a) or (b)]." §1608(e) (emphasis added). The petition stresses the use of the imperative "shall," arguing that the requirement is mandatory; failure to comply renders the default judgment non-enforceable. (Pet. 33-34). The Gates Plaintiffs respond, asserting that statutory interpretation is "judicial activism."

---

[2] *Bennett* cites to §1610(c) just once and §1608(e) twice. All three citations are in conjunction with its treatment of *Wyatt*. *Bennett*, 2016 WL 697604 at *6-7.

(Br.Opp. 17). They offer no explanation for the congressional choice of the word "shall" or what that word means in light of their interpretation of the statute.

Instead, they harp on a single sentence in the petition that states that the service requirement in §1608(e) is jurisdictional. They advance numerous theories as to why that provision might be jurisdictional and attack each of them. (Br.Opp. 18); *see also* (Br.Opp. 16-18, 29-30). Each is a strawman; the Gates Plaintiffs ignore the obvious. Section 1608 is universally held to be a jurisdiction-conferring statute. *E.g.*, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994) (construing §1608(a)) ("[S]ubject matter jurisdiction plus service of process equals personal jurisdiction."); *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 299 (D.C. Cir. 2005). Indeed, 28 U.S.C. 1330, the principal jurisdictional statute in actions against foreign states, expressly incorporates §1608, making clear that §1608 plays a significant role in defining federal jurisdiction. §1330(b).

The specific service requirement imposed by §1608(e) is no different. Congress placed the default judgment service requirement in §1608 because it intended service to be a jurisdictional condition on subsequent enforcement of that judgment. *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1414 (E.D. Va. 1988) ("[F]ailure to [serve the default judgment] directly

contravenes the requirements of the FSIA and, therefore, deprives this Court of the power to enforce the Illinois judgment."); *see also Peterson v. Islamic Rep. of Iran*, 2012 WL 4485764 at *2-3 (S.D. Tex. Sept. 27, 2012); *Glencore Denrees Paris v. Dep't of Nat. Store Branch*, 2000 WL 913843 at *2 (S.D.N.Y. 2000) (refusing to allow further proceedings against a particular defendant following non-compliance with §1608(e)). The court below appears to be the first to hold otherwise.

Finally, the Gates Plaintiffs argue §1610(g)'s legislative history, castigating the petitioners and the D.C. Circuit for failing to do so. (Br.Opp. 11-13, 25). They offer a block quote summarizing what they deem the most probative selections of the legislative history. (Br.Opp. 11-12, n.8). As their own lengthy quotation makes clear, the legislative history of §1610(g) is unhelpful here. The Seventh Circuit and the Gates Plaintiffs correctly note that an intent behind §1610(g) was to make it easier for victims of terrorism to collect their judgments. But the legislative history says nothing about the necessity of complying with §1608(e).

Elaborating on the congressional intent to facilitate judgment enforcement in terrorism cases, the Gates Plaintiffs offer specific examples where Congress amended the FSIA to facilitate that objective. (Br.Opp. 15). They ignore an important point: When Congress desires to facilitate judgment enforcement

in terrorism cases by exempting victims of terrorism from particular rules or granting them particular privileges, *it does so explicitly*. Here, the Gates Plaintiffs rest their entire case on the *omission* of §1610(g) from the text of §1610(c). They ignore clear language in both §1610(g) (the "as provided" clause) and §1608(e) (the imperative "shall") that plainly indicates that terrorism victims are required to comply with §1608(e).

II. The Seventh Circuit's decision conflicts with other Circuits and with the position of the Government

The Gates Plaintiffs wrongly assert that the Seventh Circuit's decision below is consistent with every Circuit decision on the subject.

1. *Wyatt v. Syrian Arab Rep.*, 554 F. App'x 16 (D.C. Cir. 2014), holds that §1608(e) "is a clear and unambiguous statute" that means precisely what it says and is mandatory. *Id.* at 17. Rather than addressing the decision on its merits, the Gates Plaintiffs attack the D.C. Circuit for being terse, describe it as not "thoughtful," and criticize its failure to analyze the "statutory text and legislative history." (Br.Opp. 25). That attack is nonsense. The D.C. Circuit did not engage in any lengthy analysis because it found that analysis unnecessary as the statutory text is clear and the legislative history says nothing of significance.

The D.C. Circuit saw no need to elaborate on the question given that, at the time, no appellate court had ever excused non-compliance with §1608(e).

While the Gates Plaintiffs also mention that the D.C. Circuit's *Wyatt* decision is unpublished, they do not go so far as to declare it non-precedential. (Br.Opp. 25). That is with good reason. The D.C. Circuit's *Wyatt* decision is binding here, at least with regard to the petitioners, as that appeal was simply an earlier iteration of the same case. The Seventh Circuit split with the D.C. Circuit in finding compliance with §1608(e) unnecessary.

2. The Seventh Circuit similarly split with the Ninth Circuit. In *Peterson v. Islamic Rep. of Iran*, the Ninth Circuit held that compliance with §1608(e) is a necessary precondition on enforcement even as against victims of state-sponsored terrorism. 627 F.3d 1117, 1122 & 1129 (9th Cir. 2010). That court's more recent decision in *Bennett* does not overrule *Peterson*; it cites §1608(e) just *twice* and only for the purpose of explaining the Seventh Circuit's *Wyatt* decision. 2016 WL 697604 at *6.

The Gates Plaintiffs respond by arguing that there cannot be a conflict between the Seventh and Ninth Circuits because the *Bennett* decision makes no mention of it. (Br.Opp. 22). *Bennett* had no reason to mention the conflict because the questions raised by *Bennett* do not turn on that conflict. *Bennett* cites the decision below favorably to support its claim that

§1610(g) is a "freestanding provision," independent of §1610(a) and (b). 2016 WL 697604 at *5-6. The Gates Plaintiffs did not answer the petitioners' argument that *Bennett* and *Peterson* consistently hold that while §1610(c) is not applicable to §1610(g) actions (as the court implied in *Bennett*), compliance with §1608(e) is nonetheless required (as the court held in *Peterson*). The Seventh Circuit badly erred in assuming that those holdings are mutually exclusive (Pet. 32-34; Pet. App. 27a), as *Bennett* nicely demonstrates.

3. Relying on *Peterson*, the Second Circuit likewise held that compliance with §1608(e) is a mandatory prerequisite to judgment enforcement, even for victims of terrorism with a 28 U.S.C. 1605A judgment seeking to enforce their judgment under §1610(g) and TRIA[3] §201. *Harrison v. Rep. of Sudan*, 802 F.3d 399, 406 (2d Cir. 2015). The Second Circuit had twice previously held that non-compliance with §1608(e) prohibited enforcement of a FISA default judgment. *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011); *Byrd v. Rep. of Honduras*, 613 F. App'x 31, 35 (2d Cir. 2015). Read together with *Byrd* and *Walters*, *Harrison* holds—beyond any doubt—that in the Second Circuit, failure to comply with §1608(e) prohibits judgment enforcement under §1610(c).

---

[3] The Terrorism Risk Insurance Act of 2002, codified as a note to 28 U.S.C. 1610.

The Gates Plaintiffs dismiss *Harrison* as "not reach[ing] the issues developed in *Wyatt*." (Br.Opp. 22). They never mention *Harrison* again. Perhaps one could read *Harrison* in a vacuum and conclude that it is not inconsistent with *Wyatt*. But, in light of *Byrd* and *Walters*, *Harrison* simply cannot be reconciled with *Wyatt*. Both cases address compliance with §1608(e) in the context of judgment enforcement under §1610(g). *Harrison* finds §1608(e) both mandatory and prohibitive while *Wyatt* finds §1608(e) irrelevant.

The Gates Plaintiffs distinguish *Byrd* and *Walters* on the ground that neither was a §1610(g) enforcement action. (Br.Opp. 23). The petitioners acknowledged this in their petition, explaining that *Harrison*, which is a §1610(g) action, clarifies that *Byrd* and *Walters* apply with equal force to §1610(g) actions. (Pet. 22). The Gates Plaintiffs do not respond.[4]

4. The Seventh Circuit additionally parted ways with the Government without affording the Government the opportunity to brief the issue. *See* (Pet. 27-28); *see also* Pet. C.A. Petition for Rehearing at 14-15

---

[4] The petitioners additionally demonstrated that lower courts in the Second Circuit long understood that non-compliance with §1608(e) prohibits enforcement, even before *Harrison*. (Pet. 22-24). The Gates Plaintiffs fruitlessly and unconvincingly try to distinguish those cases as well. (Br.Opp. 23-24). Further analysis would be redundant.

(7th Cir. No. 14-3327, DE 77); Pet. FRAP 28(j) letter of Sept. 21, 2015 (7th Cir. No. 14-3327, DE 78-1). That alone is reason give this matter further consideration.

Tellingly, the Gates Plaintiffs entirely ignore the conflict between the Seventh Circuit and the considered position of the Government.

III. The Gates Plaintiffs' attempt at distinguishing *Garrick* is feeble

Regarding the second question presented, the Gates Plaintiffs have nothing to say. Their entire argument is simply that Petitioners rely on *dicta* in *Garrick v. Weaver*, 888 F.2d 687 (10th Cir. 1989). (Br.Opp. 32). That is false.

The Seventh Circuit held below that the district court's order releasing the Syrian assets out of the court's registry and to the Gates Plaintiffs was merely an execution of a prior judgment. (Pet. App. 23a); (Pet. 38-39). As the petitioners explained, *Garrick* previously reached precisely the opposite conclusion:

> [A] district court, during the pendency of an appeal, [may not] authorize a party to execute a judgment on funds previously deposited into the court's registry in the course of the same litigation.

(Pet. 35). The Gates Plaintiffs do not suggest an alternative read of *Garrick* or explain what they find objectionable about the petitioners' argument.

What they find objectionable is the fact that the Seventh Circuit below plainly and directly split with the Tenth Circuit.

IV. This case presents a clean vehicle to resolve extraordinarily important issues

Unable to respond cogently on the merits of the petition, the Gates Plaintiffs conjure a vehicle problem. That problem is merely imagined:

First, they oddly object that petitioners lack "prudential standing." (Br.Opp. 30-31). That is incorrect. Petitioners hold a federal judgment and have standing to enforce that judgment in any federal court. They do not seek simply to vindicate Syria's right to notice of a default judgment against it. Nor do they seek an order invalidating the Gates Plaintiffs' erroneous §1610(c) order. They seek to collect on *their own* judgment against assets belonging to their judgment debtor.

Second, the Gates Plaintiffs assert that because the petitioners failed to raise their §1608(e) arguments in the prior *Gates* appeal to the Seventh Circuit or in the *Gates* action in D.C., those arguments are waived. (Br.Opp. 27, 29). The petitioners were not parties to the *Gates* appeal and could not have waived anything. They previously moved to intervene in D.C. to prevent sequestration of certain Syrian property. Their objectives were narrow, as was their motion for

intervention, which was *denied*. An unsuccessful movant for intervention has not waived every issue not raised in its motion for intervention.

Third, the Gates Plaintiffs rely on the Seventh Circuit's mandate following the *Gates* appeal as grounds to upend a subsequent decision by the Seventh Circuit. (Br.Opp. 26-27). This is illogical. It also fails on the merits: 1) the petitioners were not parties in the prior appeal and were not bound by the mandate, and 2) the Seventh Circuit did not even *consider* §1608(e) in the *Gates* appeal.

The Gates Plaintiffs' hopeful optimism that the Seventh Circuit may affirm on other grounds following remand is hardly grounds not to review the decision that the Seventh Circuit actually did render. That the Seventh Circuit decided this appeal on an issue not supported by the district court's decision and not raised or briefed by any party suggests that it rejected the approaches of the district court and the Gates Plaintiffs.

The Seventh Circuit issued clear holdings on two extraordinarily important issues that are ripe for review. First, creating a conflict with three other Circuits, it held that compliance with §1608(e) is optional for many FSIA judgment creditors. It thus created an enormous incentive for non-compliance with §1608(e), undermining Congress and the sovereign immunity of foreign state judgment debtors. Absent this Court's review, non-compliance will likely

become the norm in the Seventh Circuit. If §1608(e) is indeed optional, this Court should announce that to be the rule so that all plaintiffs, all foreign sovereigns, and all courts know the rules of the game. This case is an ideal vehicle for doing so precisely because the legal question was so plainly and starkly presented by the Seventh Circuit.

Second, in creating an indisputable conflict with the Tenth Circuit, the Seventh Circuit dramatically expanded the jurisdiction of district courts within that Circuit to release assets being held by the courts, notwithstanding a pending appeal that concerns title to those assets. Congress sought to prevent that by requiring in 28 U.S.C. 2042 that courts release such funds only upon a petition, "full proof of the right" to those assets, and a court order. §2042. Such an order obviously requires jurisdiction and is not simply subsidiary to a more narrow judgment resolving claims between disputing parties. *See* (Pet. 38). The Seventh Circuit disregarded §2042 and improperly granted the district courts therein judicial authority that they do not properly have. As the Gates Plaintiffs' tacitly admit, this case presents a perfect vehicle for resolving this jurisdictional question.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted.

Respectfully submitted,

ROBERT J. TOLCHIN
Counsel of Record
MEIR KATZ

THE BERKMAN LAW OFFICE, LLC
111 Livingston Street
Suite 1928
Brooklyn, New York 11201
(718) 855-3627
rtolchin@berkmanlaw.com
mkatz@berkmanlaw.com

Counsel for Petitioners

April 2016